Before the
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51

REPLY COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION

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SUMMARY

The record does not support the Commission's proposed amendments to the formula for calculating maximum telecommunications rates. The opening comments agree with the American Public Power Association ("APPA") that the Commission's proposed rule changes would be contrary to the language and legislative history of Section 224 of the Communications Act, would constitute an impermissible taking of utility property, and would not advance the Commission's broadband goals. In particular, the evidence in the record demonstrates that the Commission is simply wrong on the critical factual assumption on which it has based its proposal to eliminate capital costs from the telecommunications rate formula – that utilities take only their own needs into account in installing poles and leave it to new attachers to pay the full costs of accommodating their attachments.

Moreover, there is no evidence that lowering pole attachment costs will appreciably impact broadband deployment or availability, particularly in rural areas. Nor is there any evidence that communications providers will actually pass on any cost savings from lower pole attachment fees in the form of greater broadband deployment or lower broadband rates for their customers. Based on the evidence in the record, the Commission should withdraw its proposal to modify the telecommunications rate formula, and should instead attempt to harmonize broadband rates in such a manner as to provide for full cost recovery consistent with the existing telecommunications rate formula, as it initially proposed.

The record also demonstrates that there is no compelling need for many of the Commission's one-size-fits-all proposed changes to pole attachment practices and procedures, and that such changes should not be undertaken at the risk of compromising the safety and reliability of critical electric facilities.

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REPLY COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association ("APPA") appreciates the opportunity to submit these reply comments on behalf of the nation's 2,000 publicly-owned electric utilities. The opening comments of a broad array of utility pole owners agree with APPA that the Commission's proposed rule changes would be contrary to the language and legislative history of Section 224 of the Communications Act and would not advance the Commission's broadband goals. In particular, these comments add to the wealth of unrefuted evidence now in the record showing that the Commission is simply wrong on the critical factual assumption on which it has based its proposal to eliminate capital costs from the telecommunications rate formula – that utilities take only their own needs into account in installing poles and leave it to new attachers to pay the full costs of accommodating their attachments.

Based on this evidence, the Commission should not only withdraw its proposal to eliminate capital costs from the telecommunications rate formula, but it should adopt its initial proposal to adopt a uniform broadband rate that is consistent with the current telecommunications formula rate. The opening comments also indicate that many of the

Commission's proposed changes to pole attachment practices and procedures are unnecessary and could compromise the safety and reliability of critical electric facilities.

I. THE RECORD DOES NOT SUPPORT THE COMMISSION'S PROPOSED AMENDMENTS TO THE FORMULA FOR CALCULATING MAXIMUM TELECOMMUNICATIONS RATES

As APPA indicated in its opening comments, public power utilities share the Commission's desire to accelerate the pace of broadband deployment, adoption, and use throughout the United States. In fact, many members of APPA have been at the forefront of deploying high-capacity broadband networks that not only enhance the economic vitality and quality of life of their communities, but also contribute to America's competitiveness in the emerging knowledge-based global economy. For example, the public power utility in Chattanooga, TN, has recently become the first provider of gigabit connectivity in the United States, public or private. APPA and its members cannot, however, support the Commission's efforts to shift the costs of expanding broadband deployments, adoption, and use to electric ratepayers, particularly on the basis of assumptions that are demonstrably incorrect.

A. The Commission's Core Assumptions about Utility Investment Practices Are Incorrect

When the Commission launched this proceeding in 2007, it said that there was a "critical need to create even-handed treatment and incentives for broadband deployment" and that this need "warrant[ed] the adoption of a uniform rate for all pole attachments used for broadband Internet access service."[1] To achieve these objectives, the Commission indicated that the

[1] *In the Matter of Implementation of Section 224 of the Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking*, WC Docket No. 07-245, at ¶ 36, released November 20, 2007.

uniform rate "should be higher than the current cable rate, yet no greater than the telecommunications rate."[2]

Following the completion of the comment period, but before the Commission issued its ruling; Congress enacted the American Recovery and Reinvestment Act of 2009. Among other things, the Act required the Commission to propose a National Broadband Plan to Congress within one year, and the Commission did so on March 17, 2010. In addressing pole attachments in Chapter 6 of the Plan, the Commission stated that, "to support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible," and "the FCC should revisit its application of the telecommunications carrier rate formula to yield rates as close as possible to the cable rate in a way that is consistent with the Act."[3] In the *FNPRM* the Commission concluded that Section 224(e) expressly requires the application of a telecommunications rate for telecommunications providers and that the Commission cannot simply apply the cable rate formula to telecommunications attachments. So, to achieve the same result a different way, the Commission proposed to amend the telecommunications rate formula to preclude consideration of capital costs, thereby yielding a rate that would be less than or comparable to the cable rate. According to the Commission, eliminating capital costs was warranted because "most, if not all, of the past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner's attachments,"[4] and utilities only "install poles based on an assessment of their own needs, and, to the extent that future attachments could not be accommodated on such poles, leave it to the new attacher to pay

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2 *Id*.

3 *Connecting America: The National Broadband Plan* (2010), at 110.

4 *Id*., at ¶135.

the cost of the new pole, to the extent that one is installed."[5] To ensure that its understanding of utility investment practices was correct, the Commission specifically solicited comments on this issue.

In response, representatives of every sector of the electric utility industry – investor-owned,[6] cooperatively-owned,[7] and publicly-owned utilities[8] – submitted extensive evidence that the Commission was mistaken. As APPA noted in its opening comments, public pole owners have for decades treated their poles as resources for attaching entities of all kinds. APPA indicated that, in making their purchasing decisions for new poles, public power utilities obtain poles of a larger size and class than they would otherwise require in accommodating their own needs. Similarly, the Coalition of Concerned Utilities indicated that investor-owned utilities install taller poles, and poles of a different class, than they need for their own purposes in order to accommodate potential communications attachers.[9] The Coalition also disagreed with the Commission's premise that utilities install poles that are too short to accommodate the inevitable attacher requests, and then replace the entire pole system with a larger one at attacher expense.

> Contrary to the Commission's assumption, each of the four utilities responding to our survey explained that the reason they install taller poles than they need for their own purposes is to accommodate potential communications attachers. For

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5 *Id*., at fn. 365 (emphasis added).

6 Comments of Edison Electric Institute and the Utilities Telecommunications Council ("EEI/UTC"), the Coalition of Concerned Utilities, the Alliance for Fair Pole Attachment Rules ("Alliance"), and the Florida Investor Owned Electric Utilities.

7 Comments of the National Rural Electric Cooperative Association ("NRECA"), Flint Energies, and the Oklahoma Association of Electric Cooperatives ("OAEC").

8 Comments of APPA, City Public Service of San Antonio ("CPS"), and the Imperial Irrigation District.

9 Coalition of Concerned Utilities, at 109

> electric utilities, it makes no sense to install shorter poles with the knowledge that those poles may need to be replaced with a taller pole upon a request for attachment by a third party. The disruption to utility operations would be too great if they were required to replace every pole with a taller one every time an attacher sought to attach to it. The installation by electric utilities of taller poles than they need for themselves is simply one more way in which utilities with no fanfare have helped communications attachers reach their customers with as little inconvenience and expense as possible.[10]

Furthermore, as CPS notes, the Commission's proposal to eliminate capital costs presents additional issues for public power utilities. In many areas of the country, public power utilities, as governmental entities, are often barred by state laws from providing gifts or donations to private corporations. CPS indicates that if it does not recover the full costs of the use of its poles from third-party communications providers, it could be in violation of two Texas constitutional provisions, as the unrecovered costs could be considered impermissible gifts or donations to private corporations.[11]

In short, as the record confirms, electric utilities plan, invest in, and construct their networks as a resource for current and prospective attaching entities of all kinds. Cost issues aside, utilities have neither the time nor the desire to engage in wasteful practices, particularly practices that not only impose unnecessary costs on communications providers, but inevitably on themselves as well. This is especially true of public power utilities that, as units of local government, have a duty to ensure that their consumer-owners obtain the services they desire at the lowest rates possible. To do this, they must provide pole attachments promptly to entities of

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[10] *Id.*, at 110.

[11] CPS, at p. 7.

all kinds, and they must recover an equitable share of all the costs involved, including capital costs, from all attaching entities.[12]

In sharp contrast to the comments of the electric utilities, the comments of the cable, telecommunications, and other attaching entities that support the Commission's proposal provide no concrete evidence of utility investment practices. To the contrary, they contain nothing more than sweeping, unsubstantiated statements that parrot the Commission's tentative assumptions. For example, Bright House says only that "[u]tilities invest capital into poles for the benefit of the utility's customers, not for possible future attachers. Indeed, it would be passing strange for a utility to insist that it routinely seeks recovery of capital costs in its rate-setting process with state commissions to be reimbursed to meet the future needs of unaffiliated and unidentified attachers."[13] Similarly, Comcast's valuation expert provides not a single real-world example to support his claim that utilities only install poles that are of a height that are suitable and necessary solely for the utility's needs.[14]

Furthermore, in other portions of their comments, the attaching entities that support the Commission's proposal to eliminate capital costs flatly contradict their assertions about industry investment practices.[15] For example, in the course of addressing the language and legislative history of Section 224, NCTA asserts:

> The expectation in 1996 was that bringing down barriers to entry and promoting competition would result in the emergence of multiple, competing facilities based networks. Competitive providers were expected to use their new rights of access

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12 Imperial Irrigation District, at 4.

13 Bright House, at 16.

14 Comcast, Declaration of Timothy Pecaro, at 9.

15 We address these comments at greater length in Section I.B.

> to deploy their lines on utility poles, and with more lines on the poles, there would be more entities to share pole costs under the telecommunications pole formula. [16]

Similarly, Comcast notes that, by 1998, everyone anticipated that the number of facilities-based communications providers, and the pole attachments they required, would increase significantly during the next ten years.[17] While NCTA, Comcast, and the industry commenters are wrong about the legal consequences of these expectations, as we show below, they are quite right that everyone expected the number of pole attachments to increase dramatically over the next decade. In these circumstances, to borrow Bright House's words, it would indeed have been "passing strange" for electric utilities to ignore these widespread expectations in making their pole investment decisions. It is particularly troublesome to suggest that utilities subject to Section 224 would consider only their own needs in the face of their statutory *duty* from 1996 onward to provide pole attachments to all eligible entities that sought them.

For all of these reasons, the record contradicts the key assumption underlying the Commission's proposal to eliminate capital costs from the telecommunications rate formula. The Commission should therefore withdraw this proposal. But that is not all. The same evidence also reinforces the Commission's original proposal to adopt a uniform broadband rate that is set at the current telecommunications rate. For the last three decades, low cable rates have been justified on the ground that electric utilities must erect and maintain poles for their own purposes, so *any* revenues they receive from cable systems over and above make-ready costs should be viewed as windfalls for the electric utilities. As the record demonstrates, however, this

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16 NCTA, at 35.

17 Comcast, at 7 and quoting the FCC's 1998 Pole Attachment Order.

was never true for public power utilities, and if it was ever true for other utilities in 1978, it is no longer true now. A uniform broadband rate should reflect this reality and should apply to all broadband providers, including cable operators.

Finally, as APPA showed in its comments, the Commission's proposal to eliminate capital costs would be completely counterproductive. Doing so would encourage utilities to do just what the Commission erroneously assumes they are doing now – i.e., make investments solely to address their own needs and forcing would-be attachers to bear the heavy costs of replacements. This would inevitably make attachments more expensive and time-consuming than they are today, thus undermining the very goals that the Commission seeks to advance. APPA saw nothing in the opening round of comments that refutes these concerns.

B. Neither the Language nor the Legislative History of Section 224 Law Supports the Commission's Proposed Rate Changes

In its opening comments, APPA noted that the Pole Attachment Act of 1978 was enacted at a time when cable systems were in their fledgling stage, and Congress wanted to nurture the growth of the cable industry. In response, the Commission promulgated a cable rate formula that heavily subsidized cable systems. The formula did so by focusing only on "usable space" and allocating to cable systems a disproportionately low share of that space. For example, if a pole had 13.5 feet of usable space and two attachers – a cable system and an electric utility – the formula assigned 1 foot to the cable system and assumed that the electric utility used the remaining 12.5 feet, even though the utility probably used at most 3-4 feet of that space. The formula then allocated 7% (1/12.5) of the total pole costs to the cable system and 93% (12.5/13.5) to the electric utility. This rate methodology also ignored the fact that both the cable system and the electric utility benefited from the remaining "unusable" support space and safety space on the pole.

When Congress amended Section 224 as part of the Telecommunications Act of 1996, it was well aware that the cable formula was subsidizing cable systems heavily at the expense of electric ratepayers. To mitigate this problem, Congress took two important steps: (1) in Section 224(e), it introduced a new telecommunications rate formula that took both usable and unusable space into account; and (2) expecting most cable systems to become providers of telecommunications services in the near future, as they had repeatedly said they were going to do, Congress inserted a provision into Section 224(d) that would require cable systems to move up to the higher telecommunications rate as soon as they began to provide telecommunications services and were no longer using their attachments "solely to provide cable service."

As APPA went on to note, the House Conference Report that accompanied the adoption of the Telecommunications Act of 1996 memorialized Congress's intent that the Commission "regulate pole attachment rates based on a 'fully allocated cost' formula" that "recognize[s] that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments."[18] APPA further argued that this legislative history provided clear evidence that Congress intended and expected that the telecommunication rate formula should be higher than the cable rate formula.

Like APPA, several other utilities also noted in their opening comments that Congress understood and intended that the telecommunications formula produce substantially higher revenues for pole owners than the cable formula. For example, EEI/UTC state,

> It was clear that Congress expected – and indeed intended – pole owners would receive greater compensation under Section 224(e), evidenced by the provisions of Section 224(e)(4) allowing for a phase-in of the higher rate, and the grandfathering provisions in Section 224(d)(3) that would allow the Section

[18] H.R. Conf. Rep. 104-458, 104th Cong, 1st Sess., at 136-137.

> 224(d) rate to be used for any attachment by a cable television system "solely to provide cable service." The FCC cannot substitute its judgment for that of Congress simply because the FCC wishes to lower the telecom rate in order to support a certain policy outcome. The FCC's proposal would thwart the will of Congress by setting the cable rate as the new default rate.[19]

See also the comments of the Alliance for Fair Pole Attachment Rules.[20]

In their opening comments, some of the communications companies agreed with this interpretation but tried to limit the force of the statements in the Conference Report. For example, Bright House acknowledged that the House amendments to Section 224 and Conference Report language "instructed the FCC to regulate telecommunications service attachment rates based on a 'fully allocated cost' formula."[21] Bright House also agreed that this would "result in a higher unusable space component to the Section 224(e) formula."[22] Bright House went on to say, however, that because Congress ultimately adopted the Senate version of Section 224, this demonstrates that Congress rejected the idea that the unusable space component of the telecommunications rate should incorporate a fully-allocated cost methodology that results in higher rate than the cable rate. This argument finds no support in the language or legislative history of Section 224. While the legislation that Congress ultimately adopted did not allow electric utilities to recover all of their costs,[23] Congress did limit cost recovery. It did so not by removing any element of cost from the telecommunications rate formula, but by setting forth

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19 EEI/UTC, at 71

20 S. Rpt. 104-230, Conference Report Communications Act of 1995 at 206 (February 1, 1996) (*emphasis* added).

21 Bright House, at 18.

22 *Id*.

23 See, *TCI Cablevision of Washington v. City of Seattle*, No. 97-2-02395-5SEA, Superior Court (May 20, 1998) (appeal dismissed), at ¶ 89.

certain limitations on the face of Section 224(e) – allowing only 2/3 cost recovery and phasing in rate increases.[24] As EEI/UTC state,

> It was clear that Congress expected – and indeed intended – pole owners would receive greater compensation under Section 224(e), evidenced by the provisions of Section 224(e)(4) allowing for a phase-in of the higher rate, and the grandfathering provisions in Section 224(d)(3) that would allow the Section 224(d) rate to be used for any attachment by a cable television system "solely to provide cable service." The FCC cannot substitute its judgment for that of Congress simply because the FCC wishes to lower the telecom rate in order to support a certain policy outcome. The FCC's proposal would thwart the will of Congress by setting the cable rate as the new default rate.[25]

See also the comments of the Alliance for Fair Pole Attachment Rules, noting that the phase-in of the telecommunications rate was intended to soften the impact of rate increases that cable systems would otherwise have experienced under the telecommunications formula.[26]

NCTA and Comcast take a different, but equally erroneous, approach in support of the Commission's proposal to eliminate capital costs from the telecommunications rate formula. While acknowledging that Congress intended the telecommunications rate formula to take all costs into account, including capital costs, they suggest that the Commission should now remove such capital costs because Congress's and the Commission's predictions about the future did not pan out. According to Comcast,

> At the time of implementation in 1998, Congress and the Commission expected the telecommunications pole rates to decline towards the cable pole rate as the number of facilities-based telecommunications attachers increased during the ten year phase-in period. Consequently, the decision to simply use the same (overstated and unnecessary) cable formula cost inputs in the telecommunications

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[24] As the C*ity of Seattle* court observed, "[t]he adoption of a per capita allocation of only 2/3 rather than all of the support space was primarily a political compromise, and not based on accounting issues." *Id*., at ¶ 90.

[25] EEI/UTC, at 71

[26] S. Rpt. 104-230, Conference Report Communications Act of 1995 at 206 (February 1, 1996) (*emphasis* added).

> formula appeared reasonable at that time. However, fierce ILEC opposition to CLEC competition, and the emergence of cable technology integrating broadband (including VoIP) into the same lines used for cable service resulted in far fewer new facilities-based telecommunications attachers than anticipated – leaving telecommunications pole rents artificially high. As the Commission observed in 1998, "[u]nder Section 224(e)(2), the number of attaching entities is significant because the costs of unusable space assessed to each entity decreases as the number of entities increases."[27]

Similarly, NCTA contends that,

> The expectation in 1996 was that bringing down barriers to entry and promoting competition would result in the emergence of multiple, competing facilities based networks. Competitive providers were expected to use their new rights of access to deploy their lines on utility poles, and with more lines on the poles, there would be more entities to share pole costs under the telecommunications pole formula. Had competition developed as anticipated, with multiple providers all placing new facilities on poles, the newly added telecom rate formula would have produced results comparable to the existing cable rate formula. But for a variety of reasons, competition developed differently, with fewer competitive LECs, fewer companies attaching new facilities to poles, and technology migrating from separate lines switching circuits to IP packets integrated into lines already attached to poles for other services. As a result, applying the telecom rate formula to today's technology and market produces pole rents that are far higher than the cable rate formula, far higher than necessary to fairly compensate pole owners, and far higher than Congress anticipated.[28]

While it is certainly true that everyone expected the number of facilities-based competitors to increase over time, Comcast and NCTA do not, and cannot, cite anything in the statute or legislative history to suggest what, if anything, Congress would have done differently if it had known that the number of attachers paying telecommunications rates would increase at a slower pace than predicted.[29] Since Congress clearly intended to phase out the subsidies that

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27 Comcast, at 7 and quoting the FCC's 1998 Pole Attachment Order.

28 NCTA, at 35.

29 As the cable commenters acknowledge, one of the main reasons for the relatively low number of entities paying telecommunications rates is that they have not done so themselves, even though they have been providing telephone service for many years. This is largely due to the Commission's long delay in treating voice over Internet

cable systems had been receiving, it might well have implemented a different way of ensuring that result. In any event, the Commission is not free to amend Section 224(e) on the basis of speculation as to what Congress might have done differently. It must apply the statute as written, unless and until Congress amends it.

In summary, in the statements quoted above, the commenters supporting the Commission's proposal to eliminate capital expenses from the telecommunications rate formula have made the following significant concessions, either explicitly or implicitly: (1) that Congress understood and intended that the telecommunications rate formula would use the same cost categories as the cable rate formula, which included capital costs; (2) that Congress understood and intended that the telecommunications rate formula yield higher rates than the cable rate formula, in part by taking both usable and unusable space into account; and (3) that Congress, expecting cable systems to provide telecommunications service in the near future, understood and intended that the cable systems use the telecommunications formula as soon as they did so. That the future may not entirely have turned out the way that Congress expected does not, as a matter of law, allow the Commission to ignore or amend Section 224(e) as written and as uniformly applied for the last 14 years.

C. Nothing in Section 224(e) Supports a Cost Causation Methodology

In support of the Commission's proposal to exclude capital costs from the telecommunication rate formula, several attaching entities argue that such a change comports with principles of "cost causation."[30] For example, Comcast cites a declaration by an "economic

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protocol ("VoIP") telephony as a telecommunications service for pole attachment purposes, as it has done for many other purposes, e.g., E-911, customer proprietary network information, universal service contributions, etc.

[30] E.g. see, Bright House, at 16; Comcast, at 11; NCTA, at 16, Time Warner Cable at 6.

valuation expert" who "concurs with the Commission's approach explaining that the 'Lower Bound Rate' is more grounded in cost causation principles than the current telecom or cable rate formulas."[31]

These arguments are incorrect and irrelevant. As the Alliance notes, there is no statutory basis for limiting the telecommunications rate formula's cost basis to costs "caused" by the attaching entity.[32] Whether the attaching entity "causes" the cost of the space on the pole is simply not the statutory criterion for determining the cost basis for the rate calculation. Section 224(e) provides for allocation of the costs of providing "space" on the whole pole—both usable and unusable. As the Alliance correctly points out, "[t]he cost of the pole space itself, not the portion of such costs 'caused' by the attaching entity, is the statutorily mandated cost basis for the telecom rate. Accordingly, the proposal to substitute a cost causation principle for actual pole cost exceeds the Commission's statutory authority."

Moreover, if the FCC were now to find that the statute required a cost causation approach, it would have to revisit its historical treatment of the 40 inch safety space under both the cable rate formula and the telecommunications rate formula, because under any true allocation of actual costs, the 40-inch safety space would be assigned solely to attaching communications providers, as there is no need for such space on an electric pole if there are no communications attachments.

Finally, as a practical matter, the adoption of a cost-causer approach would be completely counterproductive. As APPA noted, under such a rule, utilities would have the incentive to purchase the smallest poles that would serve their own purposes, leaving it to attaching entities to

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31 NCTA, at p. 14.

32 Alliance, at 90.

pay for larger poles. Such an approach could dramatically increase the costs of new pole attachments and act as a disincentive for new broadband deployment.

D. The Commission's Proposal Would Result in a Taking of Utility Property without Just Compensation

APPA agrees with the commenters that argue that the Commission's proposed elimination of capital costs from the telecommunications rate formula would amount to an unconstitutional taking of property without just compensation.[33] In the *Florida Power* case, the Supreme Court of the United States upheld the cable rate formula in part because it allowed for the recovery of capital costs.[34] This the Commission simply cannot do. Further, the Commission's proposal, if adopted, would significantly interfere with the reasonable investment-backed expectations that utilities have made in reliance on the existing rate structure. That, too, is a significant factor in considering whether a government action is an unconstitutional taking.[35] Ironically, this is precisely the argument that several broadband service providers are making in opposition to the Commission's on-going "Third-Way" proceeding.[36]

E. The Record Does Not the Support the Commission's Assumption that Reducing the Telecommunications Rates Will Significantly Impact Broadband Deployment, Adoption, and Use

The underlying premise of the Commission's rate proposal is that lower pole attachment rates will lead to faster deployment and greater adoption and use of broadband. In its *Further Notice of Proposed Rulemaking* the Commission has not provided any evidence that, except possibly in isolated cases, pole attachment costs actually have a significant impact upon

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33 See, Comments of EEI/UTC, at 72.

34 *FCC v. Florida Power Corp*., 480 U.S. 245, 254 (1987).

35 *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

36 *See* NCTA's comments in *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, GN Docket No. 10-127, released June 17, 2010.

broadband business decisions. Nor has the Commission provided any reason to believe that broadband providers will actually pass any savings in pole attachment costs through to their customers or offer additional or better services. Instead, the Commission's proposals rely primarily on the recommendations contained in the National Broadband Plan. As EEI/UTC cautions, however, the Commission must be mindful that the pole-attachment section of the Plan was itself only a proposal, developed in a process that was not as rigorous as a rulemaking or other formal process entitled to the force or effect of law.

Moreover, the Plan's pole attachment recommendations were also devoid of any detailed evidence demonstrating a link between pole attachment rates and broadband deployment. In fact, despite extensive involvement in the process by a large number of utilities, the Commission's staff paid very little attention to them and appears to have been predisposed to the views reflected in its recommendations. For example, the comments of the Coalition of Concerned Utilities include a color coded copy of Chapter 6 of the National Broadband Plan, in which comments and presentations by the attacher community are highlighted in green and comments and presentations by the electric utility industry are highlighted in red. As the Coalition points out, there are thirty-eight comments or presentations cited by attaching entities and only two citations to comments and presentations by electric utilities. This is a disturbing disparity, one that underscores the need for the Commission to base its decisions in this proceeding on the actual record and to make rule changes only to address clearly demonstrated needs and only where the changes are highly likely to do more good than harm. A careful review of the record reveals that the Commission's proposals do not meet this standard.

While communications companies express widespread support for the Commission's proposal to remove capital costs from the telecommunications rate formula, none of these

commenters has demonstrated a clear need for this change, much less that the change will substantially advance the goal of fostering greater broadband deployment or usage. The majority of these comments simply echo the Commission's assumptions that the current pole attachment rates deter broadband deployment and that lowering the pole attachment rate will spur more broadband deployment. For example, NCTA's comments say little more than that the Commission should embrace the recommendations in the National Broadband Plan:

> The economic and policy justification for a low, unified broadband pole attachment rate is even more compelling given the increased national priority on broadband deployment. The National Broadband Plan urges development of a regulatory framework that will spur continued growth and new investment in the nation's broadband infrastructure. A key component of the National Broadband Plan is its call for governmental action to "ensure efficient allocation and management of assets [that] government controls or influences, such as spectrum, poles, and rights-of-way, to encourage network upgrades and competitive entry." The National Broadband Plan specifically recommends a reduction in costs and improvement of existing infrastructure, concluding the "FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, as amended, to promote broadband deployment."
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> Recognizing that the Commission's cable rate formula "has been in place for 31 years and is 'just and reasonable and fully compensatory for utilities,'" the National Broadband Plan recommends that the Commission "revisit its application of the telecommunications carrier rate formula to yield rates as close as possible to the cable rate in a way that is consistent with the Act." As found by the National Broadband Plan's creators, "[t]he cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands." Accordingly, the National Broadband Plan recommended that the Commission establish pole attachment rental rates "that are as low and close to uniform as possible," recognizing that such a step would greatly reduce the complexity and risk for those deploying broadband. "[U]ncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers)." "If the lower rates were applied, and if the cost differential …were passed on to consumers, the typical monthly price of broadband for some rural consumers could fall materially."[37]

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[37] NCTA, at 17-18.

This is not an argument, it is a feedback loop. It certainly does not provide a sufficient basis for the Commission to undertake the massive transfer of wealth from captive electric ratepayers to the communications industry.

F. There Is No Reason to Believe that Broadband Providers Will Pass Pole Attachment Cost Savings Through to Consumers

Another deficiency in the Commission's proposal is its failure to include any mechanism to ensure that broadband service providers will pass through any pole attachment cost savings to their customers. For example, in its argument in support of lower attachment rates NCTA pointed to the National Broadband Plan's statement that "[*i*]*f* the lower rates were applied, and *if* the cost differential …were passed on to consumers, the typical monthly price of broadband for some rural consumers *could* fall materially."[38] NCTA did not, however, say that its cable company members would actually pass on the lower costs to consumers. Further, it is highly unlikely that cable operators or other broadband providers would willingly accept a requirement that they pass any such costs savings on to customers. One need only look at the comments of NCTA and the entire broadband provider community in the FCC's on-going "Third Way" proceeding to see the adamant objections that cable and broadband providers have to FCC regulation over broadband services.[39]

NRECA shares APPA's skepticism, stating that it "doubts that any savings realized through the NPRM's proposed pole attachment rate decreases will be used by service providers

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38 NCTA, at 18 (emphasis added).

39 *In the Matter of Framework for Broadband Internet Service, Notice of Inquiry*, GN Docket No. 10-127, released June 17, 2010.

to fund further broadband deployment to high cost rural areas or be passed on directly to consumers, a mere hope expressed in the National Broadband Plan."[40]

G. The "Rural Argument" Does Not Support Lowering the Telecommunications Attachment Rate

As APPA showed in its opening arguments, there is no reason to believe that lower pole attachment costs would have more than a negligible effect on broadband rates in urban and suburban settings, even if broadband providers actually passed them through. The real question is whether lower pole attachment rates would advance the Commission's goals in rural areas in which population densities are very low. Some commenters contend that the answer is "Yes," because "there are fewer homes per mile of plant in rural areas, so more poles – and correspondingly more attachments – are required to bring advanced broadband technologies to each subscriber's home."[41] This argument is flawed for several reasons.

First, the argument ignores the fact that the same economics apply to electric plants in rural areas – there are fewer homes per mile of plant, so more poles are required to bring essential electric service to each electric customer's home. As a result, an electric utility will have fewer households among which to spread its lost pole attachment revenues. Furthermore, if a household's electric rates go up, it will have less disposable income to spend on broadband service. Besides, electric ratepayers do not necessarily coincide with broadband users. Why should these rural electric consumers subsidize broadband?

Second, the rural argument ignores the principal reason that broadband has not expanded into rural areas at the same pace as in more urbanized areas – i.e., such expansion is inconsistent

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40 NRECA, at 28.

41 American Cable Association ("ACA"), at 6.

with the overall business plans of for-profit communications entities. For these entities, the cost of pole attachments is essentially a "rounding error" when compared to the other costs of building and operating a broadband communications system. For example, the Coalition of Concerned Utilities points to a declaration of an executive for Cox, who recently testified in a pole attachment rulemaking proceeding before the Arkansas Public Service Commission. According to the declaration, the primary reason the cable industry does not deploy high speed broadband or VoIP service in rural areas is the enormous expense associated with head-end equipment installation and system upgrades – not the relatively minute costs associated with pole attachment rentals. The declaration identified a number of reasons why rural areas do not have high speed broadband service: (1) the large capital expenditures required; (2) insufficient average revenues; and, (3) higher operating expenses. Notably, pole attachment costs were not among the significant higher operating costs.[42]

Comments of other utilities confirm that lowering pole attachment costs is not the solution for achieving broadband deployment in rural areas. For example, NRECA conducted a survey of its members that looked at pole attachments rates and the types of communications services provided, and the data clearly shows that low pole rates, even rates as low as the *FNPRM* seeks to achieve are not enough to promote broadband deployment. As NRECA notes, "there are simply not enough consumers who can generate sufficient revenue to make it attractive for broadband service providers to deploy in these very low density areas.[43]

Further, as NRECA point out, the National Broadband Plan established that, "the data show that rural areas are less likely to have access to more than one wireline broadband provider

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[42] Coalition, at 120-121.

[43] NRECA, at 27.

than other areas" and "most areas without mobile broadband coverage are in rural or remote areas." NRECA argues that the Commission's most recent *Section 706 Report* recognizes that, "[M]arket forces alone are unlikely to ensure that the unserved minority of Americans will be able to obtain the benefits of broadband anytime in the near future," and yet, the *FNPRM* makes the unsupported assumption that lowering infrastructure costs for broadband service providers – costs that will have to be borne by electric consumers whether or not they ever are offered broadband service – will spur greater deployment."[44] As NRECA points out, its survey data disproves the *FNPRM's* assumption. APPA agrees.

Third, the rural broadband argument ignores the fact that the Commission's proposal is not targeted only at rural areas; indeed, the proposal is not even aimed at broadband. The FCC is proposing to lower the pole attachment rate across the board for all telecommunications attachments, irrespective of whether the attaching providers have any interest in deploying broadband services.

H. A Targeted Universal Support Mechanism for Broadband Deployment in Rural Areas Is the Most Appropriate Option

If rural broadband deployment is an important national objective – which APPA believes it is – then rather than require rural electric ratepayers to bear a disproportionate share of the costs of rural broadband, the Commission should treat this as a national challenge and develop targeted universal service support mechanisms to address this need. Such an approach would also be more efficient and consistent with the stated goal of the Telecommunications Act of 1996

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[44] *Id.*, at 28, quoting the FCC's *Sixth Broadband Report*, at ¶ 28 (adopted July 16, 2010) ("*Section 706 Report*").

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of removing implicit subsidies and replacing them with explicit ones. NRECA echoes this approach arguing:

> If the Commission truly hopes to achieve universal deployment of broadband services, the Commission needs to adopt a more appropriate mechanism that will, in fact, guarantee not just the initial broadband deployment, but the viability of continuing broadband service in areas lacking population density. The Commission has considerable experience with the USF program that is specifically designed to address high-cost areas in the telephone service arena. The USF program, however, does not shift costs from one industry's consumers (the telecommunications industry) to another (the utility industry). This is why NRECA has repeatedly encouraged the Commission to explore appropriate reforms of the USF to support broadband deployments.[45]

I. ILEC Attachments Should Not Be Governed By Section 224

Several incumbent local exchange carriers (ILECs) are attempting to argue that the Commission should reverse its long-standing determination that ILECs are not considered "telecommunications carriers" under Section 224(a)(5), and are therefore not entitled to access to utility poles or the telecommunications rate protections of Section 224(e). The arguments of the ILECs should be rejected. Congress specifically excluded ILECs from Section 224 because it was well understood that ILECs and electric utilities obtain access to one another's poles via joint use or joint ownership agreements, and that the two utilities had relatively equal bargaining power.

Joint use and joint ownership agreements are based on reciprocal attachment rights granted between pole owners, and as such, are fundamentally different than traditional third-party pole attachment agreements. APPA agrees and supports the comments of EEI/UTC and the Coalition of Concerned Utilities that there is no reason to reverse the FCC's prior determination that ILECs are not entitled to invoke Section 224 for access or rates, and that any

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[45] NRECA, at 29.

such decision would be contrary to congressional intent and the law. Moreover, the proposed change would put electric utilities in the untenable position of having to provide access to their poles at regulated rates, terms and conditions, but having to seek their own electric attachments without any corresponding protections.

J. Any Reductions in the Telecommunications Rate Should Be Phased In and Existing Agreements Should Be Grandfathered

Finally, without waiving its opposition to any changes to the telecommunications formula that would lower pole attachment rates, APPA reiterates that any such changes should be phased in over a period of several years. Such an approach would be consistent with the manner in which the telecommunications rate formula was implemented, and would recognize that a change of the magnitude proposed by the Commission could have adverse consequences on existing budget and planning processes.

Further, as APPA has previously suggested, consistent with the initial implementation of the telecommunications rate, provisions in existing agreements related to rates should be grandfathered. This is particularly important in view of the Commission's proposal to retain the "sign and sue" rules, under which cable and telecommunications companies can enter into pole attachment agreements and then bring complaints to the FCC challenging the enforceability of specific provisions of such agreements. The Commission's rules should provide that rate provisions contained in pole attachment agreements that pre-date any new rules adopted by the FCC, may remain in effect throughout the life of the agreement, if such rates were permissible at the time of the adoption of the agreement.

II. THE RECORD DOES NOT SUPPORT ADOPTION OF A COMPREHENSIVE TIMELINE FOR ACCESS

A number of commenters agree with APPA in questioning the Commission's assumption that the existing pole attachment access processes are not working. The comments from other pole owners concur that the Commission has not been presented with any evidence of widespread, unreasonable delays in the pole attachment process. For example, AT&T notes that there is "a considerable lack of probative evidence to show that there are systemic problems with access to poles or the enforcement process that require a wholesale revamping of the Commission's pole-attachment enforcement rules.[46]

Indeed, it is difficult to reconcile the unsubstantiated claims of attaching entities that they are experiencing delays in obtaining attachments that are appreciably slowing down the deployment of broadband services, while at the same time these entities are claiming that the high price of telecommunications attachments are deterring broadband deployment.

Moreover, as EEI/UTC point out, the FCC has itself previously recognized that guidelines and general rules for pole attachments are preferable to detailed requirements such as mandatory deadlines. In the *FNPRM*, the Commission affirmed that "no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment." Similarly, Century Link observes that of the twenty states that regulate pole attachments, no more than five have seen a need to adopt timelines or deadlines.[47]

APPA concurs with EEI/UTC that in the event that the FCC adopts specific timelines, such timelines should only be used as targeted dates for pole owners and attaching entities to

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46 AT&T, at 19.

47 Century Link, at 30.

complete the application and make-ready process. The FCC should hold that any such timelines are general guidelines, and that it expects parties to cooperate in good faith to achieve them, while acknowledging that the timelines may need to be extended depending upon the circumstances.[48] Similarly, Verizon argues that, consistent with the Commission's current approach for regulating access to poles, any new regulations for the timing of make ready work should be in the form of guidelines rather than firm deadlines.[49] Further, under no circumstances should adopted timelines for the completion of pole attachment related work be allowed to take precedence over core electric utility activities.

A. The Proposed 45 Day Time Periods for the Completion of an Application and Engineering Review and Make-Ready Work Need to Be More Flexible

Pole owners agree with APPA that the proposed requirement that utilities complete an application and engineering review within 45 days of receipt and to finalize make-ready work within 45 days of acceptance by the attaching applicant need to be more flexible. Verizon argues that the make ready deadlines proposed in the *FNPRM* do not achieve the proper balance between the needs of the provider for timely access to poles and the needs of the pole owner to ensure safety and reliability. Verizon maintains that the proposed forty-five day deadline for pole owners to complete make ready work is much less than the actual time it typically takes to complete make ready work. Verizon further points out that the type of firm deadlines contemplated in the *FNPRM* for make ready work would not provide the level of flexibility that

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48 EEI/UTC, at 20.

49 Verizon, at 22.

is required given the numerous variables that can affect the time it takes to complete make ready work, many of which are outside of the control of pole owners and existing attachers.[50]

Commenters also agree with APPA, that the proposed deadlines would likely require utilities to hire more workers to be available to meet the increased demands. For example, EEI/UTC observe that each utility is operated differently and staffs itself accordingly in order to respond appropriately to attachment requests, and that it is not possible to calculate precisely how much additional staff will be needed to respond in extremely short timeframes to a potentially unknown volume of make-ready engineering or construction requests.[51] The amount of time required for make-ready necessarily depends upon the specific request, the current workload of the utility, and the utility's need to conduct maintenance and restoration operations. Moreover, as several commenters note, many utilities operate in areas where there is a shortage of qualified electric contractors needed to perform timely surveys and make-ready under the accelerated timeframe proposed by the FCC. Further, because the periods of high volume would likely be intermittent, the staffing to meet the occasional periods of high work would have to be absorbed by the utility throughout the year. Further, even if outside contractors are utilized and paid for by attaching parties, the utility would still have to have sufficient staff on hand to review/inspect the work.

The Coalition of Concerned Utilities concurs with APPA that at most, any time periods for the completion of a review and make-ready work, should only apply to routine requests for a limited number of attachments, as determined by the local utility.[52] Attachments involving a

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50 Verizon, at 21.

51 EEI/UTC, at 19.

52 Coalition, at 18.

large number of poles, relative to the utility's size, or a substantial portion of the system, should be given additional time to review and perform make-ready. Any request that exceeds 50 poles or 5% of the owner's poles should fall outside of the FCC's prescribed timeframes. Moreover, attaching entities with large projects should be obligated to contact the utility in advance, in order to give sufficient time for the parties to mutually coordinate work and staffing requirements for the project in a manner that avoids delays.

APPA also reiterates that any rules need to allow for seasonal variations that may significantly delay or slow down the review and make-ready processes. As the Florida Investor Owned Electric Utilities confirm, in some areas of the country severe hurricane seasons make the proposed 45-day time periods for the completion of make-ready impractical. The same is true in other areas of the country where severe winters impede the ability to complete the pole attachment process in a timely manner. In such areas, the utility should be able to identify the times of the year in which only small routine jobs or emergency activities are performed.

B. Often Delays from Existing Users Rearranging/Transferring Facilities Cause Delays in the Make-Ready Process.

APPA expressed concerns that the FCC's proposed timeline for the completion of make-ready work does not adequately account for the delays in the make-ready process that are routinely caused by existing attachers not moving their facilities in a timely manner. EEI/UTC and USTA recommend that delays encountered in relocating existing attachments should stop the make-ready clock.

In contrast, some commenters appear to be almost willfully ignorant of the complexities involved in coordinating the movement of existing facilities. For example, FiberTech blithely suggests that there is no need for an additional 30 days for multiparty coordination and rearrangement of existing facilities. Instead, FiberTech says that existing providers should

rearrange facilities contemporaneously with other make-ready work and the utility should coordinate.[53]

APPA strongly disagrees. First, this suggestion severely downplays the complexity of coordinating the transfer of multiple facilities owned by various parties, each of which may be subject to different operational requirements and contractual agreements. Further, it unrealistically assumes the availability of utility time and resources to accommodate the needs of third-party attaching entities.

Moreover, several commenters agree with APPA, that the FCC's assumption that utilities can simply use the pole attachment regulations to compel existing attachers to move within its prescribed time periods, does not account for limitations in existing pole attachment agreements on the ability of the utility to require attaching entities to move or rearrange facilities in the manner and timeframe proposed by the FCC. For example, EEI/UTC, USTA and Verizon all point to limitations on relocating existing facilities in a manner or time frame that is not in accord with collective bargaining agreements.

Further, some commenters question the FCC's authority to even adopt rules relating to existing third-party facilities. For example, the Alliance maintains that the FCC lacks authority under section 224 to compel an electric utility to rearrange the existing facilities of third-party attaching entities. The Alliance indicates that the FCC's regulatory authority over pole attachments is strictly limited to its authority under section 224(b)(1) to "hear and resolve complaints" concerning disputed rates, terms, and conditions of jurisdictional "pole attachments." The Alliance argues that there is no default grant of authority to regulate electric distribution facilities or attachments to such facilities generally.

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[53] FiberTech, at 7.

> "The Commission's authority in a given case is limited to hearing and resolving a complaint relating to a specific set of pole attachments—i.e., those pole attachments that are the subject of the disputed pole attachment agreement. This limited authority does not extend to any third-party attachments or to the make-ready 'process' as a whole."[54]

APPA reiterates that at a minimum, if the Commission adopts rules requiring that existing attachments be transferred as part of necessary make-ready within a set period of time, the rules should provide that any enforcement action and liability be between the entity seeking the new attachment and the owner of the existing attachments. The utility should not be pulled in to the middle of such a dispute if it has provided timely notice of the need for the existing facilities to be removed. Similarly, APPA joins CPS and NRECA in stating that the utility should not be required to act as a clearinghouse or otherwise be put in the middle of ensuring payment of transfer costs between existing users and new attachers.

C. The Proposed Time Lines Should Not Apply to Wireless Attachments.

Several wireless carriers cavalierly argue that the Commission should apply the same or a similar timeline for processing of application requests for access and to complete make-ready work for attachments for wireless facilities. For example, CTIA indicates that while there may be some differences in the physical characteristics of wireline and wireless communications facilities, these variances do not require materially different treatment and that the same or shorter timelines should apply for access and make-ready.[55] Similarly, Metro PCS supports the application of the proposed wireline access timeline to wireless attachments, and characterizes

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[54] Alliance, at 26.

[55] Cellular Telecommunications Industry (CTIA), at 6-7.

the operational and safety concerns of utilities with regard to wireless attachments as "phantom concerns."[56]

These arguments are unconvincing. Contrary to the arguments of the wireless industry, wireless attachments are singularly different from traditional wireline pole attachments because they are located above electric facilities, and therefore involve unique safety, security and operational considerations that are not amenable to pre-determined, one-size-fits-all timeframes. As EEI/UTC argue, there are simply too many types of technologies and configurations of wireless equipment attachments to apply a cookie cutter set of access rules. Further, wireless attachments pose special operational and safety problems, NESC clearance issues and potential for exposure to radiofrequency ("RF") radiation. EEI/UTC note that engineering studies demonstrate that electric and communications wires are often close enough to pole-top wireless antennas to pose a safety hazard to utility and communications line workers.[57]

Moreover, as APPA noted, wireless attachments entail unique wind loading considerations which often require a structural analysis, as well as design issues, such as providing a power supply or equipment through the electric zone. APPA continues to urge that the rules should provide utilities with the flexibility to individually assess the availability for wireless attachments and complete necessary make-ready work on a timeframe that meets their specific operational and safety concerns.

III. USE OF OUTSIDE CONTRACTORS

APPA strongly agrees with the comments of other pole owners that the decision whether to allow the use of outside contractors, and for what purposes, should first and foremost be a

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[56] Metro PCS, at 12.

[57] EEI/UTC, at 26.

decision of the individual utility. As APPA explained, as the pole owner, the utility is ultimately accountable for what happens on and around its poles, and it therefore needs to be involved in the authorization and approval of all work performed on its poles, including the authorization of a contractor to perform make-ready work. These comments are echoed by NRECA, EEI/UTC and USTA. As EEI/UTC note, mandating that utilities allow the use of outside contractors to perform make-ready if a utility does not meet a deadline imposed by the FCC, would undermine utility control of its own infrastructure.[58]

NRECA confirmed APPA's comments that in many smaller communities or rural areas, there is a dearth of qualified contractors to work in and around electric utility poles. The Commission's proposed rules would put utilities in the untenable position of certifying work of contractors that may not be sufficiently qualified, thereby raising the risk of violating the National Electric Safety Code and state safety regulations for the work of third party contractors, as well as an increased risk of liability for serious personal injuries or property damages resulting from such work.

Accordingly, APPA reiterates that, at a minimum, a utility should be able to specify the exact standards and qualifications of any contractors that can perform work on the pole. These qualifications may include familiarity with the specific local system requirements. Further, the utility must be able to have its own representative on site, at the expense of the attaching entity, during any work by an approved contractor. In all instances, the utility or its representative must be able to exercise final authority on all decisions that relate to a pole's capacity, safety, or reliability.

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[58] EEI/UTC, at 35.

Several commenters express concern that in discussing the use of outside contractors to perform make-ready work, the FCC does not reference the use of outside contractors for the relocation of existing facilities owned by third-parties. USTA and Verizon caution that in many instances pole attachment agreements with ILECs have conditions from labor agreements superimposed upon them that establish contractual limits on the relocation of ILEC facilities by non-union personnel.

Several attaching entities suggest that the Commission's rules should authorize contractors to work among electric lines. For example, FiberTech argues that contractor work should not be limited to the communications space. FiberTech claims that properly qualified contractors should be permitted to perform make-ready work on the pole, wherever such work is required.[59] APPA reiterates that unless a contractor is a qualified electrical worker and has special communications-equipment related training or skills that the utility cannot duplicate, under no circumstances should contractors be authorized under the FCC's rules to work in and among electric lines. Moreover, even under such circumstances. the utility must authorize or approve any such work before it is commenced, and be on hand to supervise the work.

Finally, in all situations where a contractor is brought in, a utility must be able specifically require the attaching entities to indemnify the utility for the work of its contractors.

IV. PAYMENT FOR MAKE-READY WORK

Attaching entities such as ACA and CTIA express support for the Commission's proposal that attaching entities be allowed to pay for make-ready work in stages, as a means of "incentivizing" utilities to complete make-ready in a timely manner. Significantly, these commenters, like the Commission, provide no evidence that any such action is warranted.

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[59] FiberTech, at 6.

In contrast, pole owners uniformly oppose the FCC's proposal as an unnecessary and ill-advised intrusion into utility business practices. For example, NRECA voices strong opposition to the FCC's proposal to require staggered payment of make-ready costs.

> The FCC fails to identify anything in the record to indicate that the current "incentives" are somehow out of alignment. The "proposal is a solution in search of a problem – and one that would simply impose another wealth transfer from utility ratepayers to broadband providers' shareholders.[60]

Verizon indicates that the proposed rule would unreasonably expose pole owners and existing attachers to the risk of non-payment for the make ready work required to accommodate the new attacher.[61]

As APPA indicated, municipal utilities typically require payment in advance for make-ready work, particularly for larger projects. As CPS noted, in many states, such as Texas, it is not permissible for local governmental entities to provide value to private entities without compensation or to make a loan to such entities. Second, under municipal budget requirements, municipal utilities are often not permitted to perform work in advance of payment. This is particularly true in the current environment of constrained municipal budgets.

V. IMPROVING THE AVAILABILITY OF DATA

The vast majority of comments overwhelmingly opposed the FCC's proposal to obtain information regarding the location and availability of poles, ducts, conduits, and rights-of-way. ITTA's summarized the proposal as "an inefficient and costly exercise of questionable, if any,

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60 NRECA, at 16.

61 Verizon, at 28.

value."[62] Similarly, USTA characterizes the Commission's proposal as "a monumental undertaking without any apparent benefit."[63]

Further, EEI/UTC argue that requiring utilities to publicly disclose critical energy infrastructure information or to turn over such information to a national database maintained by the FCC or an unnamed third-party entity would significantly endanger the safety and operation of energy production and delivery systems across the country.[64]

APPA concurs, given the costs, security concerns and limited value; such a data collection requirement should not be imposed, particularly on smaller utilities, such as public power utilities. Moreover, as APPA observed in its initial comments, any such data is bound to contain commercially sensitive business information, and utilities, particularly government owned utilities, should not be placed in the middle of any such disputes regarding the disclosure of such information.

VI. IMPROVING THE ENFORCEMENT PROCESS

A. Enforcement Should Primarily Be Limited to Injunctive Relief

A number of attaching entities support the Commission's proposal to dramatically revise the enforcement process by amending its rules to provide for the award of compensatory damages where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable. For example, NCTA argues that such changes are necessary to make attaching entities harmed by utility practices "whole." And Charter and

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62 ITTA, at 8.

63 USTA, at 24.

64 EEI/UTC, at 27.

Comcast maintain that the awarding of compensatory damages will ensure that utilities obey the law.[65]

APPA reiterates its opposition to this proposal. First, as Verizon observes, the current enforcement system is working fine.[66] APPA agrees; there is no record of widespread abuse by utilities that would warrant such a change in the rules. Second, in light of the fact that the current process is working fine, the proposal evidences a distinct and impermissible bias on the part of the Commission. As NRECA notes, "the assumption underlying the NPRM's compensatory damages proposal – attachers must be made 'whole' – while the balance of the NPRM makes proposals that will increase utilities' costs and, at the same time, lower pole attachment rates – is grossly one-sided."[67]

Third, a finding of an unlawful denial or delay of access is likely to be highly subjective, as would the calculation of any damages caused by such a delay and, as NRECA argues, the FCC is ill-suited to perform the detailed fact-finding necessary to adjudicate compensatory damage claims. Calculating compensatory damages, if any, suffered by attachers from a utility's violation of the Commission's pole attachment rules is an inherently, and impermissibly, speculative proposition.[68] APPA agrees. The Commission's enforcement authority should primarily focus on injunctive relief. The award of damages beyond refunds or actual costs should be limited to significant violations undertaken in bad faith.

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65 Charter, at 25; and Comcast, at 32.

66 Verizon, at 44.

67 NRECA, at 20.

68 NRECA, at 20.

Further, APPA renews its suggestion that in order to bring a complaint, the rules should require an attacher to provide a pole owner with notice, during contract negotiations, of the terms it considers unreasonable or discriminatory, as well as supporting documentation if available.

B. Unauthorized Attachments

APPA agrees with those commenters who argued that unauthorized attachments are a significant and persistent problem for utilities that raise serious safety and operational issues, and that, in order to be an effective deterrent, any penalty for unauthorized attachments must carry a significant price that outweighs the risk of attempting to obtain an illegal free attachment.

Interestingly, the same entities who fully support the FCC imposing compensatory damages to make attaching entities "whole" and to ensure that utilities have incentive to obey the law, claim that the record lacks substantiated evidence that attaching entities routinely make unauthorized attachments, and argue that no changes are necessary to the existing unauthorized attachment penalties.[69] The difference is that there is well-documented and substantiated proof that unauthorized attachments are a persistent problem. Moreover, while delays in obtaining pole attachments may at worst result in lost revenues, unauthorized attachments may cause safety violations that result in catastrophic losses of life or property.

APPA agrees with EEI/UTC, ITTA, and NRECA that unauthorized attachment penalties must be high enough that communications carriers will not simply treat the expense as an acceptable cost of doing business. APPA joins other pole owners in supporting the "Oregon" approach which assesses an unauthorized attachment penalty of $500 per pole, per year, plus interest for all unauthorized wireline pole attachments. In assessing the penalty, however, it should make no difference whether the attaching entity has an agreement or not. Moreover, in

[69] Charter, at 26; Comcast, at 33; and NCTA, at 42.

recognition of the heightened safety and operational concerns surrounding wireless attachments, as well as the higher attachment fees for such attachments, APPA renews its recommendation that there should be a significantly higher penalty for unauthorized wireless attachments.

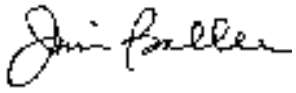
Charter suggests that claims of unauthorized attachments are often the result of inaccurate record keeping on the part of pole owners. APPA agrees that utilities should maintain good and accurate records of all permitted attachments, however, attaching entities should also be required to maintain documentation of their attachments, including any transfers, so as to be able to verify that they have all requisite approvals throughout the life of the attachment.

VII. CONCLUSION

Based on all of the above, APPA, on behalf of the nation's publicly-owned electric utilities, urges the Commission not to adopt its proposal to amend the telecommunications rate formula, as the record demonstrates that the proposed changes would be contrary to the language and legislative history of Section 224 of the Communications Act, would constitute an impermissible taking of utility property, and would not advance the Commission's broadband goals.

Based on the evidence in the record, the Commission should withdraw its proposal to modify the telecommunications rate formula, and should instead at long last attempt to harmonize broadband rates in such a manner as to provide for full cost recovery consistent with the existing telecommunications rate formula, as it initially proposed. Nor should the Commission undertake one-size-fits-all attachment practices and procedures that could compromise the safety and reliability of critical electric facilities.

Respectfully Submitted,



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